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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. LARRY LIONELL SMITH, Defendant and Appellant.	B212312 (Los Angeles County Super. Ct. No. BA326386)

APPEAL from a judgment of the Superior Court of Los Angeles County. Craig E. Veals, Judge. Affirmed.

Marcia R. Clark, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

In this appeal after resentencing, Larry Lionell Smith contends that he did not enter an "open plea" to the charges against him and that his counsel provided ineffective assistance. We disagree.

We begin with a brief review of the history of the case. At the preliminary hearing, the arresting officer testified that on July 27, 2007, he observed Smith driving a car. The officer recognized Smith from previous traffic stops and knew that he was on parole. He also recognized Smith's passenger as a parolee. He decided to conduct a traffic stop because Smith and his passenger were on parole; he did not observe any traffic violation. In the ensuing parole search of Smith's car, the officer recovered from inside the trunk of the car "a clear plastic baggy containing four additional baggies within that bag containing large clusters of an off-white substance resembling cocaine base." The parties stipulated that lab analysis revealed that the substance in the baggy was 23.63 grams of cocaine base.

In his testimony at the preliminary hearing, the same officer also described his previous traffic stops involving Smith, and he confirmed that Smith had filed a complaint against him in connection with one of those stops. Defense counsel argued that the circumstances showed that the July 27, 2007, traffic stop constituted "harassment" of Smith, rather than pursuit of "a legitimate law enforcement purpose," and on that ground, the defense moved to suppress the evidence obtained in the search. The trial court found on the basis of all of the circumstances (including the testimony of the officer, whom the court found credible) that the search was not harassment or otherwise improper ("I don't think this is harassment. I don't think there's anything wrong with what the officer did."). The court accordingly denied Smith's motion to suppress.

An information charged Smith with one count of sale, transportation, or offer to sell a controlled substance in violation of Health and Safety Code section 11352, subdivision (a). The information also alleged that (1) Smith had suffered a prior serious or violent felony conviction under Penal Code sections 667, subdivisions (b) through (i), and 1170.12, subdivisions (a) through (d); (2) he had suffered two prior convictions within the meaning of Health and Safety Code section 11370.2, subdivision (a); and

(3) he had suffered two prior prison terms within the meaning of section 667.5, subdivision (b).

At a hearing on January 18, 2008, counsel informed the court that they had reached an agreement to settle the case. The court clarified that it was Smith's intent to plead guilty and to permit the court to "determine how the sentence or what your sentence will be." Smith assured the court that he was agreeing to enter what amounted to an "open plea." In response to Smith's question whether he would be sentenced to prison the court replied, "I don't know. I'll have to consider this. Now, the People are offering you low-term, double, which is six years at 80 percent. You might get that. I wouldn't exceed it and it's possible that it would be a probationary sentence. I just have to think about this case." Smith entered a plea of guilty to the charge and admitted the truth of the prior conviction allegations.

On March 24, 2008, the court sentenced Smith to the midterm of four years, doubled to eight. The court also imposed various statutory fines and fees and credited Smith with 363 days of presentence custody, consisting of 242 days of actual custody and 121 days of good time/work time credits. Smith filed a timely notice of appeal and a request for a certificate of probable cause, which the trial court denied. We appointed counsel to represent Smith on appeal.

On September 17, 2008, on motion of appellate counsel, the trial court entered an order correcting the original sentence nunc pro tunc and imposing the agreed maximum of the low term of three years, doubled to six. The court acknowledged the earlier sentencing error and explained to Smith that the low-term doubled was the best possible sentence he could reasonably expect. The court noted the large quantity of cocaine, Smith's lengthy criminal history and stated that it would be an abuse of discretion for the court to strike Smith's prior "strike" conviction, and that because of the "strike" conviction, Smith was legally ineligible for probation.

On November 14, 2008, Smith filed a second notice of appeal, stating he was appealing (1) the sentence imposed; (2) the denial of his motion to suppress; (3) the

validity of his plea; and (4) to assert a claim for ineffective assistance of counsel. He did not receive a certificate of probable cause.

After the court corrected the sentencing error, appellate counsel in Smith's first appeal filed an opening brief raising no issues and asking us to independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436. On November 18, 2008, we directed appointed counsel to advise Smith that he had 30 days within which to personally submit any contentions or issues that he wished us to consider. We received no response.

We examined the entire record and concluded that Smith's appointed counsel had fully complied with his responsibilities and that no arguable issues existed. (*People v. Kelly* (2006) 40 Cal.4th 106, 119, 124.) We accordingly affirmed in an unpublished opinion. (*People v. Smith* (March 2, 2009, B207554) [nonpub. opn.].)

On May 8, 2009, appellate counsel in this appeal filed an opening brief raising no issues and asking us to independently review the record pursuant to *People v. Wende*, *supra*, 25 Cal.3d 436. On May 8, 2009, we directed appointed counsel to advise Smith that he had 30 days within which to personally submit any contentions or arguments he wished us to consider.

On May 28, 2009, Smith submitted a letter in which he asserted that the reporter's transcript of the hearing on January 18, 2008, falsely shows that he agreed to enter an "open plea," and that instead he agreed to enter a guilty plea in exchange for a sentence of one year in county jail with a 16-year prison sentence suspended. He apparently contends that reading all the transcripts of the various hearings together supports his assertion. Smith also contends that he received ineffective assistance of trial counsel.[1]

We have examined the entire record and are satisfied that appellate counsel has fully complied with her responsibilities and that no arguable issues exist. (*People v. Kelly*, *supra*, 40 Cal.4th at pp. 119, 124.)

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[1] Smith did not challenge the denial of his motion to suppress.

A criminal defendant who appeals following a plea of no contest or guilty without a certificate of probable cause can only challenge the denial of a motion to suppress evidence or raise grounds arising after the entry of the plea that do not affect its validity. (Cal. Rules of Court, rule 8.304(b).) To the extent that Smith is contending that he did not agree to enter an "open plea," and only agreed to plead guilty because he expected a probationary sentence, it is an attack on the validity of his plea. This issue may not be considered on appeal without a certificate of probable cause. (Pen. Code, § 1237.5; *People v. Shelton* (2006) 37 Cal.4th 759, 769-771.)

Smith's contention that the judge promised some kind of probationary sentence is contradicted by the reporter's transcript, as discussed above, and nothing but Smith's own assertion supports the claim that the transcript is false or contains errors. Nor did the trial court violate ex post facto principles in using his prior "strike" conviction to enhance his sentence and deny probation. (See *People v. Forrester* (2007) 156 Cal.App.4th 1021, 1024 ["the sentence imposed upon a habitual offender is not an additional punishment for the earlier crime, but a punishment for the later crime, which is aggravated because of its repetitive nature"].) Further, nothing in the record supports Smith's contention that his trial counsel provided ineffective assistance.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

FERNS, J.*

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* Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.